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No. 76-77

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. The order of affirmance is reported at 535 F. 2d 1255.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on June 21, 1976 (Pet. App. B). Tne petition for a writ of certiorari was filed on July 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the evidence established that petitioner's illegal activities occurred subsequent to his use of a facility in interstate commerce.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of having used a facility in interstate commerce to promote an unlawful activity, in violation of 18 U.S.C. 1952. He was sentenced to two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial established that petitioner was the owner and operator of the "Jai-Alai Club," a nightclub located in Newport, Kentucky (Tr. 106). Jack Trainer was a customer of the nightclub on a number of occasions between August 1973 and February 1974. During these visits, Trainer bought drinks for striptease dancers employed by the club, who then engaged in sexual activity with Trainer either at tables in the main room of the nightclub or in an upstairs bedroom (Tr. 107-135). During the six-month period covered in the indictment, approximately 400 sheets and pillowcases were delivered by a linen supply company for use in the nightclub (Tr. 46-51).

Trainer paid petitioner for the sexual services he received by purchasing overpriced drinks for the female employees who performed the sexual acts (Tr. 132, 157). These payments were made by checks drawn on Trainer's account. At petitioner's request, the checks—which ranged from $291 to $2,320—were made payable to the apparently non-existent James Harris Construction Company (Tr. 86, 108). Petitioner cashed nine of Trainer's checks at a bank in Newport, Kentucky. The checks were then delivered to Trainer's bank in Cincinnati, Ohio, for payment, and the proceeds were remitted to the Kentucky

bank (Tr. 88-103). The movement of Trainer's checks and the return payments in interstate commerce provided the jurisdictional basis for this Travel Act prosecution.

ARGUMENT

1. Petitioner contends (Pet. 17-21) that the evidence failed to establish that he was carrying on an unlawful activity proscribed by the Travel Act. The Travel Act, however, defines "unlawful activity" to include "prostitution offenses in violation of the laws of the State in which they are committed," 18 U.S.C. 1952(b)(1), and the indictment in this case alleged that petitioner used the facilities of interstate commerce to carry on "a business enterprise involving prostitution, lewdness, and assignation, in violation of the laws of Kentucky, under K.R.S. 436.075." The state statute defines prostitution as including "sexual intercourse for hire" and "indiscriminate sexual intercourse without hire" and defines "lewdness" as "any indecent or obscene act." K.R.S. 436.075(1)(1962). Furthermore, in addition to prostitution, the statute prohibits aiding or abetting prostitution and "receiv[ing] any person for the purpose of lewdness, assignation, or prostitution into any * * * place, structure, or building." K.R.S. 436.075(2)(1962).

Although petitioner argues that there was insufficient direct proof of the sexual intercourse required to establish "prostitution" under the Kentucky statute and that the conduct engaged in at the nightclub was not "lewd" under K.R.S. 436.075 (1962), these contentions involve an interpretation of state law and the application of that law to the facts of this case. Accordingly, they do not warrant further review by this Court.[1] Indeed, the Kentucky

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[1]Petitioner apparently contends that the evidence failed to show that he personally participated in any lewd acts or acts of prostitution with the customers. But the indictment alleged that he carried on a business enterprise involving such activities, not that he personally participated in the sexual acts.

statute alleged to have been violated by petitioner has since been repealed, and the current state prostitution statute does not limit the term "prostitution" to acts involving sexual intercourse, nor does it use the term "lewdness." Rather, it now expressly provides that a person is guilty of prostitution when he or she engages or agrees or offers to engage in sexual conduct (sexual intercourse or any act of sexual gratification involving the sex organs) with another person in return for a fee. K.R.S. 529.010, 529.020 (1975 repl.).

In any event, the court below correctly found that the "evidence and permissible inferences" were sufficient to support the jury's verdict (Pet. App. 23). There was direct evidence that petitioner's employees engaged in acts of sexual gratification for hire and that petitioner collected the payments for this activity. These facts, together with proof that a large number of sheets and pillowcases were delivered for use in the nightclub's upstairs bedroom and that petitioner requested and received the payments for sexual favors under a fictitious name, sufficiently established that petitioner was "receiv[ing] any person for the purpose of lewdness, assignation, or prostitution" into his nightclub, in violation of the Kentucky statute.[2]

2. Petitioner also contends (Pet. 12-16) that, because the sexual acts obtained in return for each of Trainer's checks preceded the movement of that check in interstate

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[2]Contrary to petitioner's assertion (Pet. 18), the record clearly established that the dancers employed at the nightclub participated in the sexual activities with the customers (Tr. 111, 132, 157). Similarly, the conduct occurred not only in seclusion, as petitioner suggests, but also at tables in the main room at the nightclub (see Pet. 8) "under circumstances where it was probable that it might have been observed by the public." *Commonwealth* v. *Hamilton*, 237 Ky. 682, 36 S.W. 2d 342 (indecent exposure prosecution).

commerce, the evidence was insufficient to establish that he performed any illegal activities subsequent to his use of an interstate facility, as required by Section 1952. The evidence showed, however, that petitioner was operating an ongoing illegal activity from August 1973 to February 1974. Each of the nine out-of-state checks cashed by petitioner during that six-month period constituted payment for sexual activity at the nightclub on separate occasions. Therefore, the interstate travel of at least eight of the checks was followed by additional conduct in violation of Kentucky law. As the court of appeals noted (Pet. App. 23), after petitioner utilized facilities in interstate commerce to cash the checks, "a major portion of the proceeds of such checks were subsequently employed, in accordance with [petitioner's] specific intent, to facilitate the carrying on of a business enterprise, * * * which involved prostitution, lewdness or assignation in violation of former K.R.S. 436.075." See also *United States* v. *Eisner*, 533 F. 2d 987, 992-993 (C.A. 6) (Pet. App. 36-37), pending on petition for a writ of certiorari, No. 76-31. *United States* v. *LeFaivre*, 507 F. 2d 1288, 1291 (C.A. 4), certiorari denied, 420 U.S. 1004.[3]

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[3]Petitioner's assertion (Pet. 12-16) of a conflict among the circuits on this issue is incorrect. In *United States* v. *Zemater*, 501 F. 2d 540 (C.A. 7), the court reversed the defendant's Travel Act conviction because there had been only one use of a facility in interstate commerce and that use had not preceded any illegal activity. The other cases cited by petitioner (and his quotation (Pet. 12-13) from the opinion in *United States* v. *Eisner*, *supra*, suggesting the existence of a conflict among the circuits) concern the extent of the use of an interstate facility necessary to satisfy the Travel Act, not—as here—the timing of that use. Even on that issue, however, recent decisions of the Seventh Circuit indicate there may no longer be a conflict. See *United States* v. *Peskin*, 527 F. 2d 71 (C.A. 7), certiorari denied, No. 75-1514, October 4, 1976; *United States* v. *Rauhoff*, 525 F. 2d 1170 (C.A. 7).

Petitioner also alleges (Pet. 3), without elaboration, that he was prejudiced by the admission of testimony of an employee at the Jai-Alai Club that petitioner had hired her to work as a prostitute at the club

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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several months prior to the period covered by the indictment (Tr. 138-140). Any error was cured, however, by the trial court's explicit instruction that the jury should disregard the witness's testimony (Tr. 188).